(9)

No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' BRIEF ON THE MERITS

NORMAN W. PRESSMAN*
TERESA A. GENEROUS
GREENSFELDER, HEMKER & GALE, P.C.
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-9090

RONALD J. MANN
Assistant Professor of Law
University of Michigan School of Law
625 South State Street
Ann Arbor, Michigan 48109

Counsel for Margaret Kawaauhau and Solomon Kawaauhau

EDWARD B. GREENSFELDER
Of Counsel

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

32pp

I. QUESTION PRESENTED

Must the Debtor intend to cause an injury in order for the resulting claim to be excepted from discharge pursuant to §523(a)(6) of the Bankruptcy Code as a willful and malicious injury?

TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

STATUTES:

OTHER AUTHORITIES CITED:

III. OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Eastern District of Missouri in this case (*Pet. App. A1-A17*) is reported at 172 B.R. 916. The opinion of the United States District Court for the Eastern District of Missouri (*Pet. App. A18-A22*) is unreported. The opinion of the United States Court of Appeals for the Eighth Circuit panel (*Pet. App. A23-A24*) is reported at 93 F.3d 848 which opinion was vacated for rehearing *en banc*. The opinion of the United States Court of Appeals for the Eighth Circuit, *en banc (Pet. App. A27-A52)*, is reported at 113 F.3d 848.

IV. JURISDICTION

The judgment of the court of appeals was entered on May 14, 1997. The petition for a writ of certiorari was filed on July 15, 1997 and the petition was granted on September 29, 1997. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. §1254(1).

V. STATUTORY PROVISION INVOLVED

11 U.S.C. §523(a): A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

VI. STATEMENT OF THE CASE[1]

A. Summary.

Petitioner Margaret Kawaauhau ("Mrs. Kawaauhau") dropped a box on her foot and developed a bacterial infection. (*Pet. App.*

---

[1] This statement of fact is taken from the findings of the bankruptcy court. Respondent did not challenge these findings on appeal. For this reason, Petitioners moved to dispense with the printing of a joint appendix; however, at the request of Respondent, a joint appendix has been prepared.

A2). She sought the services of Respondent/Debtor Physician Paul Geiger ("Dr. Geiger") for an infection resulting from this accident. *Id.* If properly treated, the infection would have been of little consequence; however, it spread and resulted in the eventual amputation of Mrs. Kawaauhau's leg because of Dr. Geiger's knowing administration of the incorrect medical care. (*Pet. App. A4*). When Mr. and Mrs. Kawaauhau attempted execution on their state court judgment they had against Dr. Geiger, he filed a petition for relief under Chapter 7 of the Bankruptcy Code seeking a discharge of these debts. (*Pet. App. A7*). The judgment in favor of Mr. and Mrs. Kawaauhau was Dr. Geiger's only substantial debt. *Id.* Mr. and Mrs. Kawaauhau filed an adversary complaint under Bankruptcy Rule 7001 seeking exception of their judgments from discharge under 11 U.S.C. §523(a)(6) as willful and malicious injuries. (*Pet. App. A1*). The bankruptcy court granted the relief sought in that complaint and thus excepted petitioners' claim from respondent's discharge in bankruptcy. (*Pet. App. A1-A17*). The district court affirmed (*Pet. App. A18-A22*), but the court of appeals sitting *en banc* reversed. (*Pet. App. A27-A52*).

B. Statement of Case.

Mrs. Kawaauhau had been a patient of Dr. Geiger in the past and had numerous medical conditions, including diabetes, with which Dr. Geiger was familiar. (*Pet. App. A2*). She sought medical treatment from him due to fever, dizziness and a red swollen leg with pus oozing from under the nail of her large toe which resulted from dropping the box on her right foot. *Id.* Dr. Geiger diagnosed Mrs. Kawaauhau's condition as thrombophlebitis of the right leg, prescribed oral doses of tetracycline in addition to the standard thrombophlebitis treatment and admitted her to the hospital. *Id.* A blood analysis performed after her admission to the hospital displayed a "left shift" in her blood's composition. *Id.* After her first day in the hospital, Mrs. Kawaauhau developed a blister on her right calf.

Id. On January 5, 1983, Dr. Geiger had hospital personnel sample and analyze both tissue from Mrs. Kawaauhau's large toe and fluid from the blister on her leg. *Id.* The analysis of the blister fluid identified Gram positive cocci bacteria in pairs. *Id.* Dr. Geiger asserted that the culture made from Mrs. Kawaauhau's toe tissue suggested that tetracycline was effective against the bacteria in her system. *Id.* Dr. Geiger continued to treat Mrs. Kawaauhau with tetracycline administered orally, except that she was given one dose of vigramycin (I.V. tetracycline) intravenously. (*Pet. App. A3*).

On January 6, 1983, further tests revealed the presence of beta streptococcus bacteria in Mrs. Kawaauhau's system. *Id.* Dr. Geiger continued to treat Mrs. Kawaauhau with tetracycline administered orally.

On January 7, 1983, Dr. Geiger stopped treating Mrs. Kawaauhau with tetracycline and prescribed penicillin for her, to be administered orally. *Id.* Dr. Geiger admitted[2] that he knew that penicillin, administered intravenously, would have been more effective than oral penicillin, but that he prescribed oral penicillin because he claimed that Mrs. Kawaauhau had previously conveyed to him her desire to minimize the cost of her treatment,[3] and he stated that he believed she was absorbing medicine through her stomach well. *Id.*

Dr. Geiger left Mrs. Kawaauhau in the care of other doctors when he left on business on January 8, 1983. *Id.* These doctors

---

[2] Dr. Geiger's testimony was admitted into evidence in the bankruptcy court, both in the form of a transcript of the testimony at the state court trial and his own live testimony in bankruptcy court.

[3] The bankruptcy court states:

> . . . Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger. Solomon Kawaauhau, Margaret's husband, testified that he never told Dr. Geiger to keep costs to a minimum in treating Margaret's leg. (*Pet. App. A15, fn 1*).

treated Mrs. Kawaauhau with moxam and penicillin, administered intramuscularly, and because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. *Id.* Upon his return on January 11, 1983, Dr. Geiger canceled Mrs. Kawaauhau's transfer to Honolulu because he thought she looked stronger and more alert than when he left her days earlier. *Id.* Also on January 11, 1983, Dr. Geiger inexplicably discontinued giving Mrs. Kawaauhau all antibiotics. *Id.*

Mrs. Kawaauhau did not receive any antibiotics for two days and on January 14, 1983, after further deterioration in the condition of her leg and consultation with surgeons, the decision was made to amputate Mrs. Kawaauhau's leg below the knee. (*Pet App. A4*).

Mr. and Mrs. Kawaauhau sued Dr. Geiger in the Circuit Court for the Third Circuit of Hawaii for injuries based on his treatment of Mrs. Kawaauhau's right leg. *Id.* The Kawaauhaus presented the expert testimony of Dr. Peter Halford, a board certified surgeon, who testified that Dr. Geiger had failed to provide adequate care in his treatment of Mrs. Kawaauhau's leg. Dr. Halford specifically testified that Mrs. Kawaauhau's illness had been mismanaged by misdiagnosis, by administering the wrong antibiotics and then the correct antibiotics via the incorrect route, and finally by discontinuing the entire treatment. (*Pet. App. A5-A7*). As a result of Dr. Geiger's actions, the infection progressed more rapidly and resulted in the amputation of Mrs. Kawaauhau's leg in order to save her life. (*Pet. App. A7*).

Dr. Geiger testified in his own defense at the state court trial and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Mrs. Kawaauhau was to administer penicillin intravenously for her streptococcus infection. (*Pet. App. A5*).

On March 25, 1987 a jury found Dr. Geiger liable to Mrs. Kawaauhau for the loss of her leg and a judgment was entered in

the Circuit Court of the Third Circuit, State of Hawaii in favor of the Plaintiff Margaret Kawaauhau and against Dr. Geiger as follows: special damages, $203,040.00; general damages, $99,000.00. (*Pet. App. A7*). Judgment was also entered in favor of Plaintiff Solomon Kawaauhau and against Dr. Geiger as follows: general damages for the loss of consortium, $18,000.00; emotional distress, $35,000.00. *Id.* The total judgment entered in favor of the Kawaauhaus and against Dr. Geiger was $355,040.00. *Id.*

Dr. Geiger moved to St. Louis, Missouri and when his wages were garnished by the Kawaauhaus, Dr. Geiger filed for relief under Chapter 7 of the Bankruptcy Code, creating a bankruptcy estate where the only significant creditors were the Kawaauhaus. *Id.* The unsecured non-priority creditors, including the Kawaauhaus, received no distribution from the bankruptcy estate.[4]

The Kawaauhaus filed a complaint in the United States Bankruptcy Court for the Eastern District of Missouri seeking to except their judgment from discharge as a willful and malicious injury under 11 U.S.C. §523(a)(6). (*Pet. App. A1*). The bankruptcy court excepted the judgment from discharge pursuant to 11 U.S.C. §523(a)(6). *Id.* The bankruptcy court held that Dr. Geiger's conduct was malicious for purposes of §523(a)(6) because he knowingly disregarded "acceptable medical practice" and his conduct was certain or substantially certain to cause physical harm. The bankruptcy court also held that Dr. Geiger's conduct "offends even a person lacking formal medical training." (*Pet. App. A14*). Dr. Geiger's egregious errors led to the worsening of Mrs. Kawaauhau's condition, making amputation

[4] The record before the lower court does not include this fact because at the time of the bankruptcy court trial, the bankruptcy trustee had not yet concluded his administration of the estate. Counsel makes this representation based upon the record now in the bankruptcy court. Counsel does not believe this fact is contested.

necessary to save her life. *Id.* The bankruptcy court concluded that Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the accepted level of care that it constituted willful and malicious conduct. (*Pet. App. A17*).

Dr. Geiger then appealed to the United States District Court for the Eastern District of Missouri and that court affirmed the judgment of the bankruptcy court. (*Pet. App. A18-A22*). The district court held that Dr. Geiger knew his treatment was substandard and his treatment was certain or substantially certain to cause Mrs. Kawaauhau harm. (*Pet. App. A22*). The district court upheld the bankruptcy court's finding that Dr. Geiger's conduct was certain or substantially certain to cause physical injury and therefore constituted a willful and malicious injury, thus causing the debt to be non-dischargeable. *Id.*

Dr. Geiger then appealed to the United States Court of Appeals for the Eighth Circuit. The court of appeals, *en banc*, reversed the decision of the district court, holding that "willful" means that the actor must intend the resulting harm and that for a judgment to be non-dischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. (*Pet. App. A36*).

VII. SUMMARY OF ARGUMENT

The Kawaauhaus' judgment should be excepted from discharge because it is for injuries resulting from Dr. Geiger's "willful and malicious" actions. This is not a case of accidental administration of an incorrect remedy. Dr. Geiger made a conscious decision to deliver substandard care and he admits that he intentionally and knowingly administered the care that he selected. Accordingly, his actions were malicious because they constituted "a wrongful act, done intentionally, without just cause or excuse." *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) and a "willful disregard of what [he] [knew] to be his duty." *Tinker*, 193 U.S. at 487.

The Bankruptcy Reform Act of 1978 (the "Code") carried forward in §523(a)(6) the identical language from the Bankruptcy Act of 1898, §17(a)(2) (the "Act"), providing for the exception to discharge of "willful and malicious injuries." 11 U.S.C. §523(a)(6) (1978). This Court's prior judicial interpretation, in *Tinker*, of the words "willful and malicious" is dispositive of the issue here. Reenactment of previous statutory language carries with it the previous judicial interpretation. Accordingly, this Court should interpret the language of 11 U.S.C. §523(a)(6) consistent with its prior interpretation, as set forth in *Tinker*.

Further, discharge of debts was designed to give the "honest but unfortunate" debtor a fresh start. Dr. Geiger is neither, and is not deserving of such sympathy. As this Court has recognized, and 11 U.S.C. §105 requires, principles of equity are paramount in bankruptcy. Elevating the standard of proof this Court established in *Tinker* to require proof of an intent to injure would confound equity and public policy. Accordingly, this Court should find that the Kawaauhaus' judgment is non-dischargeable in Dr. Geiger's bankruptcy.

VIII. ARGUMENT

A. Statutory Provisions Relating to Discharge and Dischargeability.

Title 11 §524 sets forth the basic discharge protections accorded to a debtor who files bankruptcy. Specific details related to discharge under various chapters are set forth in 11 U.S.C. §§727, 944, 1141, 1228 or 1328. Generally, a discharge prohibits the commencement or continuation of efforts to collect or recover any personal liability of the debtor that arose before the bankruptcy. 11 U.S.C. §524(a).

Section 523 of the Code sets forth certain exceptions to the general principle of dischargeability. Such exceptions permit continued enforcement of the debts described in §523(a).

This case involves the dischargeability of the Kawaauhaus' judgment under the exception set forth in §523(a)(6) for willful and malicious injury by the debtor. The issue here is whether Dr. Geiger's actions are willful and malicious resulting in an exception to his discharge, in which case Dr. Geiger will continue to be liable to the Kawaauhaus notwithstanding his bankruptcy.

B. Statutory Construction.

This case turns on the language of 11 U.S.C. §523(a)(6), preventing the discharge of claim "for willful and malicious injury by the debtor to another entity or to the property of another entity." "[T]he starting point in every case involving construction of a statute is the language itself." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986), citing *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). In addition to the language of the statute, consideration should be given to the provision as a whole, its object and the policy. *Kelly*, 479 U.S. at 47, citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986), quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285

(1956) in turn quoting *United States v. Heirs of Boisdore*, 49 U.S. 113 (8 How.) (1850).

Read literally, that language bars a discharge in this case. The language prevents the discharge of a claim for an injury that has two separate features: it must have been intentional and it must have been malicious. The uncontested factual findings of the bankruptcy court establish that Dr. Geiger's conduct satisfies both statutory requirements. First, Dr. Geiger's actions were intentional. This is not a case that involves a slip of the scalpel. This is a case where a doctor made an intentional decision to provide a specific course of treatment that led to serious injury. Second, Dr. Geiger's actions were malicious, in the sense that his conduct reflected "a total disregard for medical standards * * * that offends even a person lacking formal medical training." (*Pet. App. A14-A15*).

1. Under *Tinker*, a Specific Intent to Injure Is Not Required.

As it happens, this is not the first time this Court has considered the intent necessary for a debt to be sufficiently "willful and malicious" to be excepted from discharge in bankruptcy. This Court interpreted the same terms some 90 years ago in *Tinker v. Colwell*, 193 U.S. 473 (1904), where Frederick Tinker asked to except his judgment against Charles Colwell from discharge in Colwell's bankruptcy proceeding. Colwell had seduced Tinker's wife and Tinker had obtained a judgment for criminal conversation. Colwell filed a voluntary petition for relief under the Act in a case where, as here, the bankrupt had only one significant creditor. This Court affirmed the judgment of the Court of Appeals of the State of New York excepting Tinker's judgment from discharge.[5] While the lower court complained of a lack of

[5] The 1898 Act did not have a provision similar to 11 U.S.C. §523(a) for the determination of exceptions to discharge. Bankrupts and creditors generally litigated the discharge issue in state court. *Brown v. Felsen*, 442 U.S. 127, 129 (1979).

record,[6] it can be inferred from this Court's opinion that Colwell was not acquainted with Mr. Tinker when he began his relationship with Mrs. Tinker. Colwell insisted that his actions were not willful and malicious. Justice Peckham, speaking for the Court, addressed the willful and malicious issue:

> There may be cases where the act has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.
>
> In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.
>
> In *Bromage v. Prosser*, 4 Barn. & C. 247 (K.B. 1825), which was an action of slander, Mr. Justice Bayley, among other things, said:
>
> > 'Malice, in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . .'

[6] *Colwell v. Tinker*, 72 N.Y.S. 505, 507 (1901). "He (Colwell) further represented in his petition that the only debt or demand against him mentioned in his petition in bankruptcy was one arising upon a judgment recovered by the plaintiff in this action."

We cite the case as good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned (emphasis added).

Tinker, 193 U.S. at 485-6.

Thus, this Court distinguished the common meaning of the word "malicious" and adopted the "legal meaning" set forth by Justice Bayley. Dr. Geiger's actions were willful and malicious because Dr. Geiger knowingly administered the wrong treatment without just cause or excuse.[7]

This Court in *Tinker* further elaborated on the legal meaning of the term "willful and malicious:"

> "We think a wilful[8] disregard of what one knows to be his duty, an act which is against good morals, and wrongful in

[7] As contrasted with misdiagnosing a condition, unintentionally prescribing the wrong medication or treatment, or making an error of skill during a surgical procedure.

[8] This Court used the spelling "wilful" in *Tinker*. The Act and Code use "willful." Both are accepted spellings. *Random House Dictionary*, 2175 (2nd ed. 1993).

> and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception."

193 U.S. at 487.

Dr. Geiger's actions fit this definition because Dr. Geiger's knowing administration of substandard care was a "willful disregard of what [he] [knew] to be his duty."[9] The lower court erred by not applying the "legal meaning" of these words as defined by this Court.

Since its decision in *Tinker*, this Court has on only two occasions dealt with the willful and malicious exception to discharge issue, in *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916); and in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934). In both cases, this Court affirmed its definition of willful and malicious set forth in *Tinker*.

2. The Reenactment of the Identical Language of the 1898 Act in the 1978 Code Excepting Willful and Malicious Injuries from Discharge Carries with it Previously Articulated Judicial Interpretations.

When the 1978 Code was enacted, Congress reenacted the identical language from §17(a)(2) of the 1898 Act into §523(a)(6) of the Code.[10] This Court has repeatedly held that the 1978 Bankruptcy Code did not "silently" abrogate the judicial interpretation created by courts construing the "old" Act. *Kelly*, 479 U.S. at 43; *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986).

[9] The bankruptcy court found that [Dr. Geiger's] conduct was so far below the accepted level of care that it constitutes willful and malicious conduct. (*Pet. App. A17*).

[10] At the time of the *Tinker* decision the "willful and malicious" exception was located at §17(a)(2); however, at the time of the enactment of the Code the exception was located at §17(a)(8). *Collier on Bankruptcy*, 15th Edition, Vol. A, p. 3-19. *See Tinker*, 193 U.S. at 480.

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Kelly, 479 U.S. at 47, citing *Midlantic Nat'l Bank*, 474 U.S. at 501. *See also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Therefore, the definitions articulated by this Court in *Tinker*, discussed below, should have been applied by the lower court.

The lower court maintained that this Court's holding in *Tinker* has been overruled by the Bankruptcy Reform Act of 1978 by virtue of statements in congressional committee reports. Reenactment of a statute with a settled judicial interpretation usually includes such interpretation. *Pierce v. Underwood*, 487 U.S. 552 (1988). This Court noted in its opinion in *Pierce*, the difficulty of showing congressional *intent* when Congress reenacts the same language verbatim. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.* at 567. Accordingly, in contrast to the lower court's approach,

> In construing the scope of bankruptcy codifications, this Court has followed the rule that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Kelly, 479 U.S. at 37, citing *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986).

Furthermore, even if the discussion moved to an analysis of what Congress intended, statements in committee reports are not necessarily indicative of congressional intent.

> It has been argued that legislative history should not be given much weight as the intent of the entire legislative body. Under this line of thought, both legislative reports and individual statements on the floor represent only the intent of single, individual legislators and not the collective

> legislative body. *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Indeed, a quote from Senator Danforth in the WASHINGTON POST supports this view of legislative history. Speaking about tax legislation, the Senator was quoted as saying: "I remember one night literally following one of my colleagues around the floor of the Senate for fear that he would slip something into the Congressional Record, and I would have to slip something else in." WASH. POST, Tues., May 11, 1993, at A4.

James M. Lawniczak, *Did Congress Always Say What It Meant in the Bankruptcy Reform Act of 1994?*, 101 Commercial L. J. 372, 375 n12 (1997).

Generally, it is presumed that Congress acts intentionally and purposely with respect to the enactment of particular language in a statute. *See, BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994), citing *Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994). Further, when a term of art is used without Congress according it a special definition, that term is accorded its established meaning. *See, McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). In this case, the established meaning was determined in *Tinker* and has been articulated in Prosser and Keaton in the *Law of Torts* §34, at 213 (5th Ed. 1984).

The overall structure of the new Bankruptcy Code makes it particularly unlikely that Congress decided to abandon the prevailing interpretation of the language that it chose without making that intent evident in the language of the statute. Among other things, the Bankruptcy Code includes a massive definitional section that currently sets out specific definitions of more than 60 separate terms. If Congress wanted to adopt a neoteric reading of the terms "willful" and "malicious," it would have included definitions of those words in 11 U.S.C. §101.

3. Without Regard to *Tinker*, the Lower Court's Analysis is Flawed.

The lower court, focusing on the word "willful," inappropriately relied on the legislative history and a comment to the Restatement (Second) of Torts to support its holding. The legislative history *does not* suggest that the word "willful" is intended to modify the resulting injury rather than the act. *Tinker* applied "willful" to the act, not the injury, and subsequent legislative history showed no evidence of any intention to overrule *Tinker* in that regard. *Tinker*, using the willful standard, held that Colwell's act was willful. Dr. Geiger's actions clearly meet that willful standard.

The lower court's analysis of the "willful" prong is flawed even if made without regard to *Tinker*. Without citation of authority the lower court opined that "intentional by itself will almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless." (*Pet. App. A33*). The lower court goes on to draw an analogy to a driver who *without looking* turns into oncoming traffic. (*Pet. App. A34*). Obviously, such a driver does not *intend* to turn into oncoming traffic but does so *accidentally*. On the other hand, a driver who *sees* the oncoming traffic and *decides* to turn into it has committed an intentional act and has therefore acted willfully. The dissent below notes that this Court has consistently defined "willful" as applying to a voluntary act. (*Pet. App. A42*). This Court discussed "willful" in a non-bankruptcy case and held that willful is commonly used for "an act which is intentional, knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394 (1933). *See also, Screws v. United States*, 325 U.S. 91, 101 (1945). "[W]hen used in a criminal statute, it generally means an act done with bad purpose."*Murdock*, 290 U.S. at 394. *See also, Screws*, 325 U.S. at 101.

Dr. Geiger's treatment of Mrs. Kawaauhau was no accident! He stated on the record that he knew the correct care and gave something less effective and different. Dr. Geiger acted intentionally and therefore acted willfully under the *Tinker* and *Murdock* definitions.

The lower court drew support for its analysis from the Restatement (Second) of Torts §8A. Its analysis of the *Restatement*, however, was incomplete. To be sure, the *Restatement* does state that intentional torts ordinarily are limited to actions that result in desired consequences. The lower court omitted to mention, however, that the *Restatement* goes on to state in comment b to that same provision:

> Intent is not ... limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

Restatement (Second) of Torts §8A, cmt. b (1965).

Application of that rule to the current statute would be entirely consistent with *Tinker*. Thus, the lower court's crabbed view of willful intent is not only inconsistent with this Court's prior analysis of that question, but also with the general principles of modern tort law.

Neither Dr. Geiger nor any court below has cited any evidence of congressional intent to overrule this Court's definition of the word "malicious" and the legal construction given to it by this Court. Accordingly, had the lower court reached the issue of malice it would have been required, applying *Tinker*, to find Dr. Geiger's conduct was malicious.

C. Public Policy Dictates that the Kawaauhaus' Judgment Be Held To Be Non-Dischargeable Pursuant to §523(a)(6).

The proliferation of lawyer advertising[11] and the explosion in bankruptcy filings[12] has impressed upon the citizenry that the idea of filing a bankruptcy petition is analogous to a request for discharge of one's debts. But the concept of forgiveness of debt, while an early biblical concept,[13] is a relatively new concept in bankruptcy. The first Anglo-American statute to grant a discharge did not appear until 1705.[14] Four bankruptcy laws

---

[11] This Court first struck down ethical rules restricting lawyer advertising in *In re R.M.J.*, 455 U.S. 191 (1982).

[12] "The remarkable increase in consumer bankruptcy during the past two years is particularly alarming." National Bankruptcy Review Commission Report (October 20, 1997), at iii.

[13] Deuteronomy 15:1 provided for a sabbatical year every seven years in which debt would be forgiven. The five Books of Moses (in Hebrew, "Torah") set down the commandments but had little instruction on implementation. Until the second century this instruction was part of the "oral tradition" and was then reduced to writing by Rabbi Yehudah HaNasi (Judah the Prince) in the Mishnah. In effect, the Mishnah is to the Torah what this Court's opinions as compiled in United States Reports are to the Constitution and federal law. The Mishnah in Shebiit Ch. 10 Mishnah 2 states that a sabbatical year does not release a debt that comes as a result of a court order or certain matters which we might now define as willful and malicious, thus the first "exceptions to discharge." Under the rabbinic interpretation of Deuteronomy, Dr. Geiger's debt would not be discharged. *See*, Jacob Neusner, *The Mishnah: A New Translation*, Yale University Press 91 (1988).

[14] For an exhaustive history of the bankruptcy discharge *see* Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L. J. 325 (1991). The Statute of 4 Anne enacted in 1705 provided a discharge to an "honest and cooperative bankrupt." *Tabb* at 333. The bankrupt had to apply for the discharge. *Id.* The origin of the discharge was primarily to act as a carrot and a stick for the debtors and it was quite a stick—the death penalty to dishonest and/or uncooperative bankrupts. *Tabb* at 336-37.

were enacted by Congress during the 19th century, three of which were short lived and contained varying degrees of discharge protection for the bankrupt[15] and the last of which first contained the exception for willful and malicious injury and remained in effect from 1898 until 1978.[16]

In a society governed by law, the social compact among the citizens and between the government and its citizens gives the courts the duty and power to order compensation of victims. The arguments urged by Dr. Geiger and accepted by the lower court would set a standard where wrongdoers could avoid claims by simply denying that they intended an injury, thus depriving a

---

[15] No federal bankruptcy law was enacted until the beginning of the 19th century. The Bankruptcy Act of 1800 followed the theme of the Act of 4 Anne and its English successors which encouraged the bankrupt to work with creditors and required him to apply for a discharge. *Tabb* at 344-45. A series of bankruptcy acts followed the Act of 1800 but each was repealed shortly after enactment resulting in many years when there was no federal bankruptcy law. *Tabb* at 349-362. Each act contributed to the development of bankruptcy law in this country and had changes which included the concept of voluntary filings, allowance of non-merchant debtors, "preferential transfers" ("preference" refers to the transfer of debtor's assets prior to bankruptcy which results in one creditor being preferred over other creditors. 11 U.S.C. §547) as a basis for denial of discharge, and requiring creditors to take affirmative action to object to a bankrupt's discharge (note that "Bankrupts"are now more euphemistically referred to as "Debtors." 11 U.S.C. §101(13)).

[16] The list of exceptions to discharge grew but none explicitly excepted "willful and malicious injuries" until the Bankruptcy Act of 1898 in §17(a)(2). *Tabb* at 368 n342. In 1903 before this Court's decision in *Tinker*, the Act was amended to provide for an exception for criminal conversation. This Court's decision in *Tinker* was not based on that exception, which was not in effect at the time of Mr. Colwell's dalliance. The exception for criminal conversation remained in the Act from 1903 until its repeal in 1978. The criminal conversation exception was not reenacted in the 1978 Code. The exception for willful and malicious injuries remained in the 1898 Act until its repeal in 1978 and was reenacted in §523(a)(6) of the 1978 Code using the same language. *Tabb* at 368.

victim of an essential element of proof. This very restrictive interpretation would eviscerate §523(a)(6) of the Code and provide a shield for an entire category of debts which has not been contemplated by Congress in the Code.

The United States Court of Appeals for the Fourth Circuit noted this when it affirmed the decision of lower courts excepting a claim from discharge as a willful and malicious injury against a debtor who used the proceeds of business collateral to purchase personal luxury items:

> . . . To require specific malice or some other strict standard of malice for non-dischargeability of a debt under the Bankruptcy Code would undermine the purposes of that provision and place "a nearly impossible burden" on a creditor who wishes to show that a debtor intended to do him harm (citations omitted). To require such specific malice would restrict Sec. 523(a)(6) to the small set of cases where the debtor was foolhardy enough to make some plainly malevolent utterance expressing his intent to injure his creditor.

St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1009-1010 (4th Cir. 1985).

A recent case in the Fifth Circuit further demonstrates the potential injustice that may result from adopting the standard proposed by Dr. Geiger and articulated by the lower court. In that case a debtor carrying a loaded double-barreled, sawed off shotgun approached a car in his driveway, containing a passenger with whom he had a dispute. He tapped on the windshield twice and the gun went off, striking the passenger in the face and causing severe injury. *In Re Delaney*, 190 B.R. 77 (Bankr. W.D. La. 1995).

The bankruptcy court excepted the injury from the debtor's discharge. *Id.* The court held that an injury to a person is

"malicious" if it is wrongful and without just cause or excuse and "willful" if the debtor intentionally does an act which necessarily leads to injury, citing *Chrysler Credit Corp. v. Perry Chrysler Plymouth*, 783 F.2d 480 (5th Cir. 1986). The court held:

> It is beyond peradventure that loading a twelve gauge, double barreled, sawed-off shotgun and pointing it toward the face of another unarmed person or against a windshield just beyond the face is wrongful and without just cause. The facts also support a finding that the acts were deliberate, intentional and led to the plaintiff's injuries. The debtor systematically went to his room and loaded the gun. He briefly put it down when reprimanded by his father. Even after his father advised him to relinquish it, he again picked up the weapon, put his finger on the trigger and headed outside to confront the plaintiff.

In Re Delaney, 190 B.R. at 82-83.

However, on appeal the district court reversed, reading the record differently:

> Our reading of the record leads to a finding that the weapon discharge was inadvertent, unintended, and totally accidental. We are driven to that conclusion for many reasons, including the trial testimony of David Delaney at page 322; the trial testimony of William Mayers at page 51; and the deposition testimony of the victim himself at pages 34, 42, and 60. We are particularly interested in the victim's assertion that Mr. Delaney "tapped twice to get my attention, I guess to get my attention." page 60.

Delaney v. Corley, 185 B.R. 521, 523 (W.D. La. 1995).

The Fifth Circuit in *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996), affirmed the district court's reversal of the bankruptcy court decision primarily because the maimed victim was unable

to provide the key element of proof, an element only the perpetrator could provide . . . an admission of intent.

A case which provides further support for the policy enunciated by Mr. and Mrs. Kawaauhau is *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd* 100 B.R. 477 (W.D. Mo. 1988) *rev'd* 869 F.2d 394 (8th Cir. 1989), *vacated* 874 F.2d. 1254 (8th Cir. 1989) (*en banc*). In *Hartley*, the employer sent an employee into the basement to clean used tires with gasoline. As a joke, he threw a firecracker down into the basement to startle the employee. The firecracker ignited the fumes and caused terrible injuries to the employee who took exception to the employer's discharge in bankruptcy. The *Hartley* case is instructive, and unlike the *Delaney* case in which animus could be implied by the disagreement between Delaney and Corley, no ill will was evident between Hartley and his employee. The bankruptcy court excepted the judgment from discharge as a willful and malicious injury, offering an analysis of the policy reasons for denying discharge:

> The final reason that this Court concludes plaintiff's claim against defendant is not dischargeable is probably more philosophical than legal. Basically, certain acts, no matter how intentioned, are too dangerous and too harmful to ever be discharged in bankruptcy. Our social fabric requires certain limits and constraints on each one of us who constitute the woof and warp of that fabric. Without those limits and those constraints, we become a true anarchy. Mr. Justice Holmes perhaps expressed it best when he said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Although it is only distantly analogous, the absolute danger of harm to others by an act of a debtor should be

> a consideration by the Court in ruling [on] §523(a)(6) questions.

In Re Hartley, 75 B.R. 165, 168 (Bankr. W.D. Mo. 1987).[17]

To borrow the *Hartley* court's words, our social fabric requires certain limits. Surely, an unfortunate but honest debtor, even a physician who has made an honest mistake, ought not to spend his life in indentured servitude for a simple error. But some actions like those of Dr. Geiger whose treatment of Mrs. Kawaauhau was found by the bankruptcy court to "offend[s] even a person lacking formal medical training" are beyond those limits. To affirm the judgment of the lower court would be to forgive acts which go beyond these limits. The hurdle erected by the lower court is so high that few, if any, unfortunate victims, no matter how egregious the act, could surmount it.

The Petitioners' case finds support in long standing principles of bankruptcy espoused by this Court:

> There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. Section 2a, 52 Stat. 842, 11 U.S.C. §11(a); *Pepper v. Litton*, 308 U.S. 295 (1939).

Bank of Marin v. England, 385 U.S. 99, 103 (1966).

Furthermore, the "discharge," which we have seen was only a recent addition to American bankruptcy law, is not a free pass for the sloppy, reckless or those that disregard their duty, but a fresh start for the honest and unfortunate debtor:

---

[17] The ruling was affirmed by the district court but reversed by a panel of the Eighth Circuit. The panel decision then was vacated by the grant of a petition for rehearing *en banc*. The bankruptcy court and the district court's decisions were then affirmed when the circuit court *en banc* failed to reach an opinion by an evenly divided vote in *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), 100 B.R. 477 (W.D. Mo. 1988), 869 F.2d 394 (8th Cir. 1989), 874 F.2d 1264 (8th Cir. 1989) (*en banc*).

> One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554-555 (1915). This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. *Stellwagen v. Clum*, 245 U.S. 605, 617.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

As the dissent points out below, the Kawaauhaus, not Dr. Geiger, are the unfortunate but honest parties to this dispute. (*Pet. App. A50*). It would be perverse to use the discharge to further harm them.

IX. CONCLUSION

Petitioners are reminded of the story of an American tourist in Paris wanting refreshment on a hot summer day and trying to communicate this desire by slowly and repeatedly mouthing the words, "I want some 'Iiice——— Cr—eeeam,'" as if the sound of these English words had an intrinsic meaning established at creation which would readily become apparent to any listener as long as they were said slowly and often enough.[18] Disregarding for the moment the years of litigation, the suffering of the Kawaauhaus, and the evasive actions of Dr. Geiger to avoid compensating a patient whom he injured, the positions of the parties in this case can be reduced to two simple statements:

---

[18] T.K. Stretton, *A Lesson in Language* (unpublished), Cheltenham H.S. 1965.

Dr. Geiger, like the tourist who failed to understand that the sounds used to represent words are mere symbols without intrinsic meaning, hopes that if he says the word "malicious" enough and with sufficient vehemence, this Court will grant him forgiveness because of its *sound.*[19]

The Kawaauhaus, who understand that words have no meaning unless they are given one, know that the words "willful and malicious" mean what this Court says they mean and "neither more nor less"[20] irrespective of their sound. The Kawaauhaus' ask that this Court hold Dr. Geiger responsible because of the *meaning* this Court has given to these words, a meaning which has stood undisturbed through ten decades of this Court's rulings and congressional legislation.

For the reasons set out above, Petitioners ask that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit and affirm the decisions of the United States District Court which affirmed the decision of the United States Bankruptcy Court, thus excepting the Kawaauhaus' judgment from discharge.

---

[19] Dr. Geiger's position does have some support in the *naturalist view* deriving largely from teachings of Plato which maintained that there was an intrinsic connection between sound and sense. On the other hand is the *conventionalist view*, largely Aristotelian, that this connection is purely arbitrary. *The Cambridge Encyclopedia of Language*, Cambridge University Press 101 (1987).

[20] "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean-neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master—that's all.'" Lewis Carroll, *Through the Looking Glass And What Alice Found There*, 66 (University of California Press ed., Pennyroyal Press 1983) (1871).

Here, this Court is the master and has spoken.

Respectfully submitted,

Norman W. Pressman*
Teresa A. Generous
Greensfelder, Hemker & Gale, P.C.
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-9090

Ronald J. Mann
Assistant Professor of Law
University of Michigan School of Law
625 South State Street
Ann Arbor, Michigan 48109

Counsel for Margaret Kawaauhau and Solomon Kawaauhau

Edward B. Greensfelder
Of Counsel

*counsel of record